

CHIN TED LIT

v.

PUBLIC PROSECUTOR

HIGH COURT, KUCHING

DATUK CHONG SIEW FAI J.

[CRIMINAL APPEAL NO. KG9 OF 1989]

4 OCTOBER 1993

CRIMINAL LAW: Charge of criminal breach of trust - Payment for repairs made to damaged electricity service line handed to accused - Whether payment was 'entrusted' to accused to be made over to the Electricity Corporation - Whether accused received payment in his capacity as officer of the corporation or in his personal capacity.

EVIDENCE: Cautioned statement - A 'mixed' statement - Effect of.

WORDS & PHRASES: Scope of term 'entrusted' as used in s. 405 of the Penal Code.

The appellant (henceforth referred to as "the accused") was at the material time the officer-in-charge of the Sarawak Electricity Supply Corporation (SESCO) in Seriau, East Malaysia. On 25 January 1980 he personally attended to a report of a damaged electricity line at the house of one Liew Shen (PW7). PW7 had unintentionally severed the electricity service line running by his house when felling a tree in his compound. PW7 and his son testified that after some negotiation, the accused had agreed to repair the line for RM350. They contended that the accused had at all times conducted himself as an officer of SESCO, had arrived in a SESCO van and been accompanied by SESCO workers who repaired the line.

The damage was repaired and upon payment of the said sum, PW7's son testified that he asked for an official receipt. However, the accused purportedly replied that the whole matter was to be a 'secret', therefore no receipt could be given. Further he advised the two not to inform anyone of the incident.

Further to an investigation initiated by the Corporation and pursued by the police, the accused was charged under s. 405 of the Penal Code, convicted and sentenced to 6 months imprisonment. The accused now appeals to the High Court against his conviction, contending that the repair was an unauthorised job, not done on behalf of SESCO and therefore he had incurred no obligation to account for the money received.

a Held:

[1] The question whether PW7 had entrusted the money to the accused is one depending on the facts and circumstances of the case. Section 409 of the Penal Code does not limit the mode in which a trust arises. It could arise by specific order or by reason of its being part of the proper duty of a public functionary. At no time prior to the receipt of the payment did the accused indicate with any clarity that the repair work to be carried out was by him in his personal capacity as opposed to on behalf of SESCO. It is also clear that PW7 at all times intended to contract with SESCO and had intended to pay the money to SESCO through the accused. The circumstances and facts indicate that the sum of RM350 was paid to the accused in the latter's capacity as a public servant. The learned Sessions Court Judge was justified and rightly concluded that the accused in effecting the repair did so as an officer and employee of and on behalf of SESCO. The money was clearly meant for SESCO and the accused held the money on behalf of or in trust for SESCO.

c**d****e****f**

[2] In concluding that the accused had acted dishonestly, the Court takes into account that the accused had not made known to PW7 that the contract was between PW7 and him in his **personal capacity**. The accused had also cautioned PW7 that the incident was to be kept a secret despite the fact that a SESCO van and SESCO personnel had been utilised in the repair work. The need for secrecy clearly indicates the accused's dishonest intention.

g

[3] The accused's cautioned statement is a 'mixed' statement - partly self-serving and partly inculpatory. It is exculpatory in that the accused denied demanding money for the repair; inculpatory in that in it he admitted carrying out the repair. In the circumstances, the whole statement must be considered in deciding where the truth lies.

h

[4] The term 'entrusted' used in s. 405 of the Penal Code is preceded by the phrase "in any manner" and includes all cases in which goods are handed over, even voluntarily, for a specific purpose or with some direction as to how it should be dealt with. The evidence in its totality justifies the conclusion that the money was entrusted to the accused on behalf of SESCO and that the accused had acted dishonestly in retaining it for himself.

i

[Appeal dismissed].

Cases referred to:

Abdul Wahab v. PP [1939] 8 MLJ Rep. 247 (*refd*)
Bahru Zaman bin Ali v. PP [1949] 15 MLJ 23 (*refd*)
R v. Sharp [1988] 86 Cr. App. R. 274 (*refd*)
R v. Duncan [1981] 73 Cr. App. R. 359 (*refd*)

Legislation referred to:

Penal Code, ss. 24, 405, 406, 409
 Prevention of Corruption Act 1961, s. 4(a)

For the appellant - Anthony Tai; M/s. Anthony Tai
For the respondent - Selvanathan, DPP

JUDGMENT**Chong Siew Fai J:**

Originally the appellant was charged under s. 4(a) of the Prevention of Corruption Act 1961. At the close of the case for the prosecution the learned Sessions Court Judge discharged and acquitted him of that charge on ground of insufficiency of credible evidence, and altered the charge to one of criminal breach of trust under s. 405 of the Penal Code and punishable under s. 406 thereof. The altered charge reads:

That you, between 25 January 1980 and 6 February 1980, at 37th Mile Kuching-Serian Road Serian or thereabout being entrusted with certain property, to wit a sum of RM350 in cash, committed criminal breach of trust and that you thereby committed an offence punishable under s. 406 of the Penal Code.

At the conclusion of the case, the appellant was found guilty of the altered charge, convicted thereon and sentenced to 6 months' imprisonment

The appeal is against the conviction

At the trial in the Sessions Court, the appellant (accused) did not give evidence. He could, of course, do so. He was not bound to give evidence and was entitled to remain silent.

Prosecution Case

Briefly, the case for the prosecution may be thus stated.

In the morning of 25 January 1980, PW7 Liew Shen and his employee, PW11 Douglas ak Lintang, were felling a tree in the compound of the former's house as the tree was obstructing or leaning against an electricity post. In the process of so doing, the overhead electricity service line or wire was damaged. PW9 Liew Juk Tze (PW7's son) reported the matter to the accused who was the officer in charge of the Sarawak Electricity Supply Corporation

a (SESCO) in Serian. The accused went to the scene.

Upon arrival, the accused told Liew Shen that it was wrong to damage the service line and that he could put the latter in prison. Liew Shen asked if the line could be repaired. The accused said that could not be done and that if he were to ask Kuching to come and repair, it would cost more than a thousand ringgit. On the same day at about 2 00 p.m., the accused returned and told Liew Shen that the cost for the repair would be RM400. After some bargaining, they agreed at RM350. At about 4 00 p.m. the accused returned with 2 SESCO men and repaired the damaged line.

After the repair, the accused collected the sum of RM350 which Liew Shen passed to his son Liew Juk Tze (PW9) to be handed to the accused. Both Liew Shen and his son Liew Juk Tze asked the accused for a receipt for the sum paid, and were told that there would be no receipt as it was something secret. Liew Shen said he was reminded not to tell the SESCO people or anyone else about the matter. According to Liew Shen, the accused said it was a secret only after the sum of RM350 was handed over and the receipt was demanded, and Liew Shen said he would not have handed the money to the accused if the accused had told him that no receipt would be issued and that it was a secret. Liew Juk Tze also said the money was payment to and meant for SESCO and not for the accused personally.

f Three days later, the accused brought along another SESCO employee George ak Limbe (PW12) to improve the repair done earlier.

PW8 Chai Muk Shin was a neighbour of Liew Shen and was in Liew's compound shortly after the accused's arrival in the morning of 25 January 1980. On 28 January 1980, he had an anonymous letter Exh P2 addressed to the manager, SESCO, written. He signed the letter. The letter complained *inter alia*, about the accused refusing to issue receipt for payment of the RM350 received by the accused.

g On the instructions of the general manager of SESCO, Datuk William Lai (PW1), an investigation was carried out by Png Meng Chew (PW2) assisted by Chai Shin Tung (PW3). As a result of the investigation, a report (Exh. P3) was made at the Police Station, Serian. The police then began their investigation. State-

i ments were taken including a cautioned

statement from the accused, Exh. D1. In the statement, the accused admitted doing some repair but denied demanding any money for the repairing service. The accused was arrested on 23 January 1987 and subsequently charged.

Judgment of Sessions Court

In his judgment the learned Sessions Court Judge (LSCJ) found that at all material times the accused was representing himself as an officer and employee of SESCO, acting on behalf of SESCO. This is what he said in his judgment (page 62 of the Appeal Record):

All the indications from the moment the accused arrived at the scene to the time he was handed the money, point irrefutably and irresistibly to the fact that he was representing himself as an officer and employee of SESCO, acting at all material time, on behalf of SESCO. It seems obvious, on the evidence, that the complainant Liew Shen PW7 and his son Liew Juk Tze PW9 were dealing with the accused as an officer of SESCO and nothing else.

The LSCJ also dealt with the 2 essential ingredients of the offence charged that is:

- (1) whether the accused was at the material time entrusted with the sum of RM350 or with dominion over it; and
- (2) whether the accused had dishonestly misappropriated the said sum of RM350 or had converted it to his own use.

After considering the evidence and the law, he found both ingredients proved beyond reasonable doubt. More particularly, under the 1st ingredient, he held that the payment of the RM350 by PW7 Liew Shen was to SESCO through the accused, and that the accused held it on behalf of or in trust for SESCO. He rejected the defence contention that payment of the sum was for the accused personally and held as a fact that the accused was acting on behalf of SESCO at the time he received the sum of RM350. He based the finding on the circumstances as shown by the evidence including that at the material time the accused was an employee of SESCO, that the payment by Liew Shen was for the costs of the repairs to the SESCO overhead line and it was meant for SESCO, that SESCO workers (other than the accused) were involved in the repairs and that the accused drove a SESCO van to the scene. (See page 63 and 64 of the Appeal Record).

- a* As regards the 2nd ingredient, that is, dishonest misappropriation of the sum of RM350 or converting it to his own use, the LSCJ considered the law and the evidence including the cautioned statement of the accused and came to the conclusion that the accused had dishonestly misappropriated the money entrusted to him at the material time.
- b*

Contentions for appellant on appeal

- c* For the accused it was contended that he was doing a unauthorised job in carrying out the repairs and therefore not doing it on SESCO's behalf, that he was not acting on SESCO's behalf in receiving the money, that SESCO had never entrusted him with the money and that the accused did not hold the money on SESCO's behalf or in trust for SESCO. It was also contended that he did not receive the money in his capacity as an officer of SESCO.

- d* It is, of course, true that SESCO never entrusted the accused with the money. In fact the money was handed to him by PW7 Liew Shen through the latter's son, PW9 Liew Juk Tze.

- e* The question whether Liew Shen had entrusted the money to the accused is one depending on the facts and circumstances of the case. The section (Section 409) does not limit the mode in which a trust arises. It could arise by specific order or by reason of its being part of the proper duty of a public functionary. In the instant case, the accused at the material time was the acting Station head, in charge of the SESCO in Serian and was in fact the Officer-in-charge of the Serian District. After PW9 Liew Juk Tze reported the incident of the damaged wire to him on the morning in question he went to the scene. The evidence of PW7 Liew Shen shows that the accused, who came in a SESCO vehicle, told him that it was wrong to damage the electricity line for which he (PW7) could be sent to prison. After inspecting the service line, the accused left but returned several times the same morning. Upon being inquired by PW7 if the line could be repaired, the accused, according to PW7, told him that if he (the accused) "were to ask Kuching to come and repair", it would cost more than RM1000. In the afternoon of the same day at about 2 o'clock, the accused returned and told PW7 that PW7 had to pay RM400 for the repair. After some negotiation, the accused agreed at RM350 and left. At about 4 p.m. the accused returned. He came with 2 SESCO men to do the repair.
- f*
- g*
- h*
- i*

On 28 January 1980 some corrective work was done to the line. Again this was done by PW12 George ak Limbe, a technical assistant of the SESCO, and they went in a SESCO van. This goes to indicate the capacity in which the repairs were carried out.

The contention for the accused seems to be that the agreement or transaction to repair was entered into with PW7 by the accused in the latter's personal capacity (as opposed to on behalf of SESCO). Is this a proper and justified contention? As pointed out earlier, the evidence of Liew Shen is that the accused told him that if he (the accused) "were to ask Kuching to come and repair", - whatever that might mean - it would cost more than RM1000. In the afternoon the accused returned and told Liew Shen that the repair fee would be RM400. After negotiation they agreed at RM350. At no time did the accused indicate with any clarity that the repair work to be carried out was by him in his personal capacity as opposed to on behalf of SESCO. It was only after the repair and when receipt for the payment was demanded that the accused said it was a secret, that there would be no receipt, and told PW7 not to tell anyone about it. Learned Counsel for the accused pointed out that upon being recalled, PW7 had testified that the accused did say that if PW7 gave the accused RM350, the accused could do the repair. This, however, must be considered together with all the other relevant evidence on the issue. In other words, on the totality of the relevant evidence, could it be fairly and reasonably said that on 25 January 1980 the accused had put across to PW7 or PW9 that he was to do the repair in his personal capacity? I think not. After the repair, Liew Shen through his son PW9 Liew Juk Tze handed RM350 to the accused. Liew Shen demanded a receipt for the payment and was not given one. Under cross-examination, Liew Shen said that the payment was to SESCO and that the receipt he demanded was the official receipt from SESCO. Upon being recalled, Liew Shen testified that the accused said the matter was a secret only after the handing over of the sum RM350 and when he asked for a receipt therefore. He further said that he would not have handed the money to the accused if the latter had told him that no receipt would be issued and the matter was a secret. This effectively justifies the view that the accused did not tell PW7 that the repairing work was done in the former's personal capacity.

- a* The evidence also indicates that Liew Shen at all material times had intended to contract with SESCO. When the line was damaged, he had his son Liew Juk Tze (PW9) inform SESCO. He demanded SESCO's receipt for his payment and took exception when the accused refused to give one. This is what Liew Shen said in his evidence under cross-examination (page 14 of the Appeal Record):

The money was not meant for Mr. Chin Ted Lit - but for SESCO but he was the one who received the money. The money was for the payment of the repairs of the damaged service line. It was not a reward for the repair work done. I did demand from him a receipt. I mean the official receipt from SESCO. The money was meant to be paid to SESCO - since he was from SESCO.

- b* And, upon being recalled, he maintained (page 29 of the Appeal Record);

Mr. Chin did say that no official receipt to be issued because it was something secret. ... I did tell him he must give me a receipt. He told me there was no receipt as it was secret. It was certainly not under table money - it was meant for SESCO. By "secret" I mean something unofficial.

- c* (Under re-examination):

Mr. Chin said it was secret only after the money of RM350 was handed over to him and I had asked for a receipt. I would not have handed the money of RM350 to Mr. Chin if he had told me that no receipt would be issued and it was secret.

- d* It is clear on the evidence that Liew Shen had all along no intention to enter into a contract of repair with the accused in the latter's personal capacity. It is also clear that Liew Shen had intended to pay the sum to SESCO through the accused.

- e* One may take the matter a step further. If the accused could properly effect the repair in his personal capacity, why should he need PW7 to keep it a secret? Again, at least by the time PW7 paid the sum RM350, the accused would have known that PW7 meant the payment to be for SESCO. Why should he tell PW7 not to tell anyone in SESCO about the matter if he could lawfully carry out repair in his personal capacity? Why should he even deny demanding payment in Exh. D1? These are features that have been brought to surface by the prosecution.

f

g

h

i

Defence had been rightly called. The accused chose to remain silent which he, of course, was entitled to do.

Since PW7 had not intended to contract with the accused personally and from the fact that the former demanded from the accused SESCO's receipt for the payment coupled with the circumstances of the incident including that Liew Shen enlisted SESCO personnel in Serian to effect the repair, it is clear that the sum of RM350 was paid to the accused in the latter's capacity of a public servant, that is, an officer from the SESCO. In fact there is evidence from Liew Shen that the payment was to SESCO. In this connection the testimony of PW5 Yong Hwang Sang, a regional manager of SESCO, Kuching and Samarahan Divisions, shows that the accused at the material time was the acting Officer-in-charge of SESCO's Serian district. Respecting the damage to the overhead line in the present case, PW5 considered it a minor damage costing about RM200 and the officer at the station concerned could repair it though the office at Kuching should normally be informed. There is also evidence that the repair on 25 January 1980 was done by the accused and 2 SESCO men. And, there is, as noted earlier, the evidence of the technical assistant at SESCO, Serian, PW12 George ak Limbe, to the effect that in the afternoon of about 28 January 1980 he was asked by the accused to do some corrective work. SESCO's vehicle was used on both dates. All the evidence goes in support that the accused was at the material time acting in the course of his employment and within his scope of authority and that the money paid by Liew Shen to him was for SESCO. I would observe here that when Liew Shen made the payment and demanded for SESCO's receipt, the accused did not (and in fact never at any material time) tell Liew Shen that the repair was a transaction or contract between him personally and Liew Shen. He told Liew Shen that it was a secret; and he said this **only after** the repair had been carried out and when Liew Shen demanded receipt for the payment.

In short, there is ample evidence that the payment by PW7 through PW9 to the accused was intended for SESCO. This was known to the accused at least at the time the money was handed over and receipt thereof demanded for, if not earlier. The accused did not at any time tell PW7 that the repair was a transaction between PW7 and him personally as opposed to SESCO.

- a* The accused at all material times was an officer-in-charge of the SESCO in Serian. He used the vehicle and personnel of SESCO to effect the repair. The money was handed over in payment to SESCO and by virtue of the accused's employment with SESCO. The LSCJ was justified and rightly concluded that the accused in effecting the repair did so as an officer and employee of and on behalf of SESCO. The money was clearly meant for SESCO and the accused was accountable for it.

- c* Before me it was further contended that the repair work was not an authorised job. There is evidence from PW5 Yong Hwang Sang, the regional manager, that the repair in the instant case was a minor one, that procedurally, in such a case, the engineer available should normally be informed before repairing work was proceeded with, and that repair could be done first before payment. It must be noted that whatever procedural steps or matters needed to be complied with in cases of damage was an internal matter and internal requirement of the SESCO from its employees, and that whatever departure or non-compliance of procedural requirements in this case was the doing of the accused himself. As far as a consumer like PW7 is concerned, it is the ostensible or apparent scope of the employee's authority that matters and not the technical limitations under some internal rule of the employer and the use made by the employee of his actual official capacity that matter. In the instant case, PW7 had all along intended to contract or transact with SESCO and had, through the demand for SESCO's receipt at the time of payment to the accused, made crystal clear that the money was to be paid to SESCO.

- g* On the evidence and the surrounding circumstances of the case, even with the failure of the accused in obtaining the authority or consent of the authority or engineer, it is obvious that the accused was acting in the course of his employment as an officer of SESCO when the repair transaction was concluded and when the repair was carried out. It is not open to the accused to use his own default to obtain authority or approval or his own failure to inform the engineer as a ground to excuse himself. The contention of the accused is invalid and ineffective as a defence.

- i* In *Abdul Wahab v. PP* [1939] 8 MLJ Rep 247 a case on s. 406 of the Penal Code, the following

view of Murray-Aynsely J. was followed in *Bahru Zaman bin Ali v. PP* [1949] 15 MLJ 23:

I am of opinion that where money is given to any person in his official capacity, whether he has any right to take it or not, he is entrusted with it within the meaning of the section.

In *Abdul Wahab's* case the department concerned was not supposed to take the money that was given to the offender who was a Forest Ranger. The offender received the money and misappropriated it. In our instant case under appeal, the SESCO was to receive payment for repairs carried out by its officers, the accused, himself a SESCO officer, carried out the repair with the help of the SESCO personnel who were his subordinates and PW7 in paying the money meant it for SESCO, but the accused pocketed it arguing that it was a personal repair by him. As I have said earlier, if the accused could rightly engage in the repair work in his personal capacity, why should he tell PW7 not to tell anyone and why did he deny demanding payment in Exh D1. He had not given any explanation.

On the evidence the LSCJ was, in my opinion, right in concluding that PW7 in making the payment was entrusting the money to the accused in payment to SESCO. On the evidence, the LSCJ, in my opinion, was justified and rightly came to the conclusion that the accused received the sum of RM350 in his capacity as an officer of SESCO and was acting for SESCO when he received the amount. It follows that the accused held the money on behalf of or in trust for SESCO.

As regards ground 1(d) of the appeal alleging the 'finding' of the lower Court that SESCO had confidence in the accused, what the LSCJ said was that there was nothing to indicate or suggest that SESCO had no confidence in the accused. The difference is not insignificant; and the LSCJ was right in his observation.

The second ground of appeal reads:

In determining whether the appellant/accused had dishonestly misappropriated the sum of RM350 the learned trial Session Court Judge failed to consider and direct his mind adequately or at all to the other facts and circumstances and in particular the words and actions of the Appellant/Accused both prior and subsequent to the repairs and the payment of RM350 and which failure to consider or non-direction amounted to a

a misdirection which had occasioned a failure of justice (pages 64, 65 and 66 of the Appeal Record refer).

b This ground relates to the question of misappropriation or conversion of the money and the element of dishonesty in so doing. The main thrust of the argument on behalf of the accused is that the repair was an unauthorised piece of job, not done on behalf of SESCO and therefore incurred no obligation to account for the money received. Accordingly, so it was contended, the LSCJ, in finding that the accused had acted dishonestly, had erroneously taken into consideration the following factors:

- c* (a) that a sum of RM350 was received by the accused on behalf of SESCO - a fact allegedly unsupported by evidence;
- (b) that the accused had failed to issue an official receipt;
- d* (c) that the accused had failed to render an account to SESCO;
- (d) that the accused had failed to rectify the situation by returning the money to the proper authorities;
- (e) that the accused had made no attempt to reimburse the money;
- e* (f) that the accused had failed to give any reasonable or plausible explanation or justification for his action.

f As stated above, the LSCJ in my opinion, was justified and rightly came to the conclusion that the accused effected the repair as employee of and on behalf of SESCO and had received the money in his capacity as an officer of SESCO and was acting for SESCO when he received the sum.

g This effectively disposed of the second ground. Indeed, to an extent, Mr. Tai in his written submission conceded that the LSCJ "would have been correct to take these factors into consideration had the evidence established that the accused had received the sum of RM350 while he was doing the repair works properly authorised by SESCO and on behalf of SESCO". He had, of course, added the element of authorisation, respecting which I have already dealt with earlier in this judgment. From the evidence of PW5 Yong Hwang Sang, the repair was a minor one. In any event, on the evidence and in all the circumstances of this case including that some other SESCO staff were enlisted to effect the repair, SESCO's vehicle was used, the failure to obtain authority or inform the

i

SESCO Kuching about the repair was a departure by the accused from the internal rule or practice of the SESCO. It was his own doing. On the facts and circumstances of the present case, it is not an exculpatory circumstance for the accused.

As rightly submitted by Mr. Tai, the question of whether or not the act of the accused was dishonest was one of fact to be inferred from the proved facts and circumstances of the case. But I am unable to accept his contention that on the totality of the evidence, dishonest intention on the part of the accused had been negatived. For one thing, on the evidence, the accused did not make known to Liew Shen that the repair was a contract between him (as opposed to on behalf of SESCO) and Liew. It was only when Liew demanded for receipt for the payment that the accused said it was a secret. The evidence of Liew Shen clearly shows that he intended to contract with SESCO. The fact that the accused treated the repair as a secret when he was using SESCO personnel and vehicle for the operation clearly indicates his dishonest intention.

Here I would refer again to the accused's cautioned statement Exh. D1. It is what is sometimes called a "mixed" statement, that is, one that is partly self-serving and partly inculpatory - exculpatory in that in it the accused denied demanding money for the repair; inculpatory in that in it the accused admitted carrying out the repair. In the circumstances the whole statement should be taken into account in deciding where the truth lies. *R v. Sharp* [1988] 86 Cr. App. R. 274 H.L. (situation in the common law) approving *R v. Duncan* [1981] 73 Cr. App. R. 359; and in the instant case under appeal, the brief cautioned statement should be considered together with the relevant evidence adduced by the prosecution on the issues, the accused having elected not to give evidence which he was, of course, entitled to do. It must also be borne in mind that his failure to testify is not evidence of guilt. He is entitled to see if the prosecution can prove its case. The denial of demanding payment in Exh D1 is clearly refuted by PW7 and PW9 and not believed by the LSCJ. Indeed, the main thrust of the submission on behalf of the accused was not that no payment was made but rather that the sum of RM350 paid was not in payment to SESCO. Furthermore, it may not be impertinent to ask: why should the accused deny if, according to the submission of Counsel, he had a *bona fide* claim and if he was rightfully

a doing the repair work in his personal capacity without contravening his duties as officer of the SESCO in Serian?

b As regards the failure to refer the repair to the Kuching SESCO office, the explanation of the accused in Exh. D1 was that the damage was "not that serious" and he repaired the line himself, and **not** to the effect that it was a personal contract or transaction between himself and Liew Shen, having no connection or nothing to do with SESCO.

Ground 3 of the Appeal reads:

c The verdict is unreasonable and cannot be supported having regard to the evidence adduced.

This ground bears relation to the previous 2 grounds of appeal under which the evidence adduced has been dealt with.

d For the accused, the elements of 'entrustment' and 'dishonesty' were specifically brought up under this ground. It was pointed out that entrustment contemplated the creation of a relationship whereby the owner of the property made it over to another person to be retained by him until a certain contingency arose or to be disposed of by him on the happening of a certain event. Whilst it is true that a trust arises in the given situation above-described the term 'entrusted' used in s. 405 (and for that matter in s. 409) of the Penal Code covers a much wider area. The term is preceded by the phrase "in any manner" and includes all cases in which goods are handed over, even voluntarily for a specific purpose or with some direction as to how it should be dealt with. Whether there is entrustment in a case depends on the facts of the particular case. Where an accused is given possession of property to deal with it in a particular manner, the ownership being in the person other than the accused, the accused can be said to be entrusted with that property. In our instant case, the facts and the circumstances including the conduct of Liew Shen, *inter alia*, of asking for SESCO receipt at the time of handing over the money through his son is clear indication that the amount was handed over for the benefit of SESCO. On the evidence, there existed an entrustment which the accused deliberately chose to ignore.

e As regards the element of dishonesty, s. 24 of the Penal Code defines a thing as being done 'dishonestly' where it was done with the intention

**Dun & Bradstreet (Singapore) Pte. Ltd. & Anor. v.
Dun & Bradstreet (Malaysia) Sdn. Bhd.**

[1994] 1 CLJ

Haji Abdul Malek bin Haji Ahmad J.

369

of causing wrongful gain to one person, or wrongful loss to another person. The evidence of Liew Shen demanding a SESCO receipt for the payment clearly indicates that the payment was to SESCO. Liew Shen called the SESCO office at Serian for the repair and, as a result, the repair work was done by the accused with the personnel and facilities of the SESCO. In his cautioned statement Exh. D1, the accused denied demanding payment for the repair. He had also failed to make over the payment or account for it to SESCO. The evidence in its totality justifies the conclusion that the accused had acted dishonestly.

On the evidence the LSCJ was, in my opinion, amply justified in finding that the money was held by the accused or entrusted to him for the benefit of SESCO.

The LSCJ was justified in coming to the conclusion as he did and rightly convicted the accused.

Neither in law, nor on the facts has any sufficient reason been shown for interfering with the decision of the LSCJ and for quashing the conviction. The appeal against the conviction, therefore, is dismissed.

As the 6-month imprisonment sentence, of which there is no appeal and respecting which I consider fair and reasonable, was stayed pending appeal, and since the appeal fails, the accused is to serve the sentence forthwith.

a

**DUN & BRADSTREET
(SINGAPORE) PTE. LTD. & ANOR.**

v.

**DUN & BRADSTREET
(MALAYSIA) SDN. BHD.**

b

HIGH COURT, KUALA LUMPUR
DATO' HAJI ABDUL MALEK BIN HAJI
AHMAD J.
[CIVIL SUIT NO. D5-22-345-93]
27 SEPTEMBER 1993

c

TRADE MARKS: Utilising trade name of another - Passing off - Uncommon trade name - Scope of business activity of defendant wide - Plaintiffs not registered in Malaysia but having dealings with local entities - Whether plaintiffs have goodwill and reputation to protect in Malaysia - Whether public would confuse the two businesses as one and the same or an extension thereof.

d

INJUNCTION: Whether there was a serious question to be tried - Passing off - Identical trade name - Intention of plaintiff to expand business locally - Hampered by defendant's use of their trade name - Damage to business reputation - Balance of convenience.

e

The plaintiffs are members of an international group of companies in the business of providing credit information services and business and marketing information services amongst others. The first plaintiff is a Singapore subsidiary of the second. The first plaintiff had penetrated

f

the local market and had contracts with local entities. The plaintiffs aver that plans to incorporate a company here using the second plaintiffs' trade mark (registered locally under 'Dun & Bradstreet', certificate issued on 21 May 1987) had been impeded by their discovery of the defendant's use of their business name since

g

13 March 1992. The plaintiffs claim that their name had become distinctive and known internationally and in Malaysia. They allege that the defendants have acted to "utilise the plaintiffs' reputation and goodwill" and that the appropriation of the identical business name was

h

mala fides. They therefore apply to restrain the defendants from using the said name for their (defendant's) business.

i

The defendants maintain that the plaintiffs had no established presence, goodwill and reputation to protect in Malaysia as they were not locally registered companies and had not contributed to the payment of taxes locally. They